Nos. 99-603 and 99-960

IN THE

Supreme Court of the United States

LEGAL SERVICES CORPORATION,

Petitioner,

—v.—

CARMEN VELAZQUEZ, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

CARMEN VELAZQUEZ, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER LEGAL SERVICES CORPORATION

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Preliminary Statement[1]

Respondents face a heavy task on their facial challenge to the suit-for-benefits limitation: establishing that the government's decision not to subsidize lawsuits challenging existing welfare law violates welfare claimants' constitutional rights, in all instances and under any circumstances. To carry this burden, Respondents characterize the suit-for-benefits limitation as "totalitarian," supposedly "the most egregious violation of viewpoint neutrality to have come before the Court in recent years." Resp. Br. at 14, 32.

Respondents are simply wrong, however, when they brand the limitation a "self-interested" attempt by "the government" to insulate its own laws from constitutional challenge. The welfare laws are not the work of a monolithic "government." Although the suit-for-benefits limitation was enacted by Congress, the limitation removes funding from challenges to federal, state and local regulations, and state statutes, as well as Congress's own handiwork. Thus, the suit-for-benefits limitation does not protect Congress's viewpoint; it removes funding from cases that allege contradictions between laws promulgated by different political bodies. Congress has validly decided not to subsidize this discrete category of controversial, politicized, and, presumably, expensive cases.

In reply, Respondents insist that LSC lawyers cannot determine, at the outset of a case, whether to assert claims challenging existing law. Based on this assumption, Respondents hypothesize a series of ethical dilemmas that face LSC lawyers who discover a challenge to

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[1] We cite Respondents' brief as "Resp. Br.," and the briefs filed on behalf of the various *amici curiae* as "NYSBA Br.," "ACLU Br.," and "AJS Br." All case and record citations are as in LSC's initial brief ("LSC Br.").

existing law in the midst of an ongoing suit for benefits. Respondents thus contend that the limitation does not divert *cases* from the LSC program, but instead dictates the *arguments* LSC lawyers can make within cases, thereby disrupting lawyer-client relationships and muzzling speech in the courtroom.

This parade of horribles is disproven by a single fact: Since enactment of the suit-for-benefits limitation, LSC lawyers have handled thousands of benefits matters. Not one of these lawyers is before the Court alleging that a challenge to a welfare law materialized during a lawsuit, leaving the lawyer in an ethical quandary. This is not surprising; although the nature of a factual claim will often evolve during the litigation process, it should ordinarily be clear at the outset of a litigation whether to contend that the text of one law violates the provisions of some higher law.

At bottom, Respondents are contending that since no other lawyers are available to test the validity of welfare reform laws, the suit-for-benefits limitation effectively prevents *any* challenges to those laws. This contention is legally irrelevant; the government has no obligation to subsidize the exercise of a right, even if individuals would be unable to exercise that right without the government's assistance. This contention is also untenable; much of the cutting edge welfare litigation excluded from the LSC program will likely be handled by non-LSC legal aid organizations, private lawyers, and bar associations.

Granted, some welfare claimants may be unable to find a lawyer to assert challenges to the welfare laws. But other types of litigation for the indigent are also underfunded. Allocating the federal subsidy between these different types of cases is the prerogative of Congress, not of the lawyers whose work Congress subsidizes.

For these reasons, the court of appeals' invalidation of the suit-for-benefits limitation should be reversed.

ARGUMENT

A. The Suit-for-Benefits Limitation Does Not Exclude Welfare Claimants from a Public Forum Based on their Viewpoint

Although Respondents try to defend the court of appeals' analogy to *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), Respondents' reply papers suffer from the same three flaws as the court of appeals' opinion.

1. The LSC Program Is Not a Public Forum

Rather than satisfy the crucial "public forum" element of *Rosenberger*, Respondents downplay it, contending that the government must be viewpoint-neutral whenever it subsidizes a private speaker's speech, rather than the government's own speech.[2] From this starting point, respondents claim that since LSC lawyers are independent of the government (and often adverse to it), they are private speakers whose speech must be subsidized regardless of viewpoint. Resp. Br. at 19-21; ACLU Br. at 9-22.

The touchstone in *Rosenberger* was not, however, the identity of the speaker (governmental or not), but the nature of the program created by the subsidy (public forum or not). *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (explaining *Rosenberger*:

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[2] Respondents also try to side-step the public forum element by contending that speakers cannot be excluded even from non-public fora on the basis of viewpoint. Resp. Br. at 28 n.27. The cited cases are not applicable to a selective subsidy, however; they involved direct restrictions on speech.

"by subsidizing the Student Activities Fund, the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints") and 598-99 ("*Rosenberger* . . . found the viewpoint discrimination unconstitutional, not because 'private' speech was involved, but because the government had established a limited public forum. . . .") (Scalia, J., concurring). Moreover, the *Rosenberger* Court explicitly noted that although the doctors in *Rust v. Sullivan*, 500 U.S. 173 (1991) were "private speakers," the government could regulate their conduct within its services program. *Rosenberger*, 515 U.S. at 833 (distinguishing *Rust* by noting that "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program").

Similarly, although LSC lawyers are private speakers, the services they perform are part of a federal program. Since that program is not designed to promote expression, let alone the free expression of the public at large, it is not a public forum governed by the principle of viewpoint neutrality. In fact, the LSC program is "not a forum at all." *See Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 678-679 (1998).

Yet Respondents challenge the very notion of a governmental services program, contending that the distinction between a program for the promotion of speech and a program to deliver services is mere semantics. Resp. Br. at 22-23 and n.19. Although Respondents are correct that expression can come in many different forms, there is an obvious difference between a program to promote free and open expression and a program to deliver specific services to eligible individuals: If the government refuses, on the basis of viewpoint, to provide a speaker with a speech subsidy that is generally available to other speakers in a public forum, then the

government's action may have the effect of suppressing speech. If, however, the government merely limits the services offered in a defined program, the government is simply promoting one policy without also supporting a competing policy.

Even Respondents agree that the government is free to take a particular viewpoint when it promotes policy through expression *per se* (*e.g.*, when the FDA warns about the dangers of smoking (*Finley*, 524 U.S. at 610-611(Souter, J., dissenting))). Resp. Br. at 19 n.17. The government must have the same power to promote a particular policy through non-expressive means, including by subsidizing a program to provide services. In this context, the First Amendment simply has no relevance.[3]

2. The Suit-for-Benefits Limitation Does Not Discriminate Against Any Particular Viewpoint

Even if the LSC program were somehow a public forum, Respondents have not shown that anyone is excluded from it based on viewpoint. In our initial brief, we explained the deficiencies in the court of appeals' holding that the suit-for-benefits limitation is biased in favor of the status quo. In reply, Respondents recharac-

[3] Alternatively, Respondents try to defend the court of appeals' holding that litigation is a public forum by analogizing litigation to a university. Resp. Br. at 27-30; ACLU Br. at 17-21. But Respondents do not address (let alone rebut) our point that the LSC program, not the litigation process, is the proper subject of the forum analysis. LSC Br. at 27-28. The analogy is, in any event, absurd; the courtroom is not part of a "tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835. Thus, litigants' First Amendment rights are not comparable to those of a university, its professors, or its students. *Cf. Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 n.13 (1985) (litigants' First Amendment rights different from individuals' rights of political expression).

terize the limitation, claiming it operates in a "self-interested manner designed to insulate the government's own viewpoint about the validity of its laws from effective challenge by the subsidized speaker." Resp. Br. at 12-14.

But the "welfare laws" are a mosaic of federal, state and local law. They reflect the "viewpoints" of legislatures, judiciaries, and administrative agencies in all these political systems. *See* NYSBA Br. at 8-9. While Respondents focus on "challenges to existing law" alleging the unconstitutionality of a federal statute, these lawsuits more often contend that the federal statute which created a given welfare program trumps an inconsistent state or local law (or federal regulation) designed to implement that program. In such a case, the welfare claimant is not *challenging* Congress's viewpoint, but trying to *enforce* it.[4]

Thus, the suit-for-benefits limitation does not insulate Congress's viewpoint from challenge; it removes funding from a certain category of cases regardless of viewpoint: expensive, politicized "test cases" that could require a court to resolve alleged contradictions between laws promulgated by different jurisdictions. This categorical restriction is consistent with all the other restrictions in the LSC statute that are designed to steer the program clear of politics—none of which is viewpoint-based. Pet. App. at 20a-23a.

[4] Carmen Velazquez's claim—that she was precluded from arguing that New York State law violated federal law (C.A.J.A. 278-79)—illustrates this point. So do many of the cases cited by Respondents. *E.g.*, *Sullivan v. Zebley*, 493 U.S. 521 (1990) (HHS regulation violated federal statute); *Blum v. Bacon*, 457 U.S. 132 (1982) (New York statute violated federal regulation); *King v. Smith*, 392 U.S. 309 (1968) (Alabama regulation violated Social Security Act); *McCoy v. Department of Health & Welfare*, 907 P.2d 110 (Idaho 1995) (Idaho regulation violated Title X).

3. Respondents Do Not Identify a Coherent Speaker for Purposes of the First Amendment

Finally, in response to LSC's argument that the court of appeals misidentified LSC lawyers as the relevant "speakers," Respondents concede that "the primary speaker in this case . . . is the indigent client for whom the lawyer is acting as a speech-proxy. . . ." Resp. Br. at 27.

Yet Respondents' brief repeatedly invokes the rights of LSC lawyers. For example, the brief includes a lengthy challenge to LSC's program integrity regulations. Resp. Br. at 33-44. Since these rules are designed to permit adequate alternative channels for grantees' affiliates to conduct prohibited unsubsidized activities, this challenge implicitly advocates the rights of lawyers, not clients. Respondents also suggest there is no constitutional distinction between regulating the speech of a lawyer in Court and "prevent[ing] the subsidized lawyer from entering the courtroom in the first place." Resp. Br. at 31. This rhetorical flourish contradicts Respondents' concession that the client is the one with the First Amendment rights, because the client is certainly not "prevented from entering the courtroom."

Respondents' inability to identify a coherent speaker further illustrates the inapplicability of free speech analysis to this case. The analogy to *Rosenberger* should be rejected.[5]

[5] Respondents also ask the Court to reconsider its holding in *Rust*. Resp. Br. at 19 n.17. As we explained in our initial brief, however, the central issue in *Rust* was a restriction on the speech between the doctor and patient. LSC Br. at 17-18 and 23. Reconsidering that issue would have no bearing on the Court's resolution of the issue here, namely, the validity of a restriction purely on the services the lawyer can render. Thus, it would be inappropriate to reconsider *Rust* in this case.

B. The Suit-For-Benefits Limitation Does Not Violate the Associational Rights of Welfare Claimants and LSC Lawyers

In addition to their free speech claim, Respondents contend that the suit-for-benefits limitation violates welfare claimants' freedom to associate with competent LSC counsel, because the limitation manipulates "the representational judgments made by a government-funded lawyer." Resp. Br. at 17. Respondents' primary allegation is that challenges to existing law will become apparent only after an LSC lawyer has initiated a benefits claim, putting the LSC lawyer in an ethical dilemma: either withdraw from an ongoing case, thereby prejudicing the subsidized claim, or forego the challenge to existing law, thereby precluding the unsubsidized claim. NYSBA Br. at 6-17.

Respondents' argument depends entirely on dictum in *Rust*, where this Court suggested that an "all encompassing" doctor-patient relationship might enjoy First Amendment protection from "significant impingement" by the government, even if the government subsidized that relationship. 500 U.S. at 200. While Respondents put great weight on these words, this Court rejected the claim, for reasons that are equally applicable to the claim at hand.

First, as the court of appeals held, "the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships . . . considered in *Rust*." Pet. App. (99- 603) at 14a. The LSC Act has always prohibited LSC lawyers from engaging in political activities or from handling certain categories of politicized cases within the LSC program. LSC Br. at 2-5. And LSC lawyers have an obligation to explain these restrictions to their potential clients at the outset of any representation. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 96-399 (1996) ("ABA Op."). Thus, LSC clients cannot possibly believe they are hiring lawyers who are in a position to express all of their views, rather than render them specific services. As a consequence, LSC lawyers and clients do not have the kind of "expressive associational relationship" that was crucial to the holdings in *NAACP v. Button*, 371 U.S. 415 (1963), and its progeny. *See* Resp. Br. at 14-17.

Even if the relationship between an LSC lawyer and client were "all-encompassing," the suit-for-benefits limitation does not "significantly impinge" upon it. Certainly the suit-for-benefits limitation is nothing like the criminal and ethical sanctions considered in *Button* and its progeny, all of which *prohibited* relationships between clients and the unsubsidized private counsel of their choice. Moreover, in *Rust*, this Court held that forbidding a doctor to recommend abortion or to refer a patient to an abortion-provider did not significantly impinge upon the doctor-patient relationship. *Rust*, 500 U.S. at 192-95. Since the suit-for-benefits limitation does not include comparable restrictions on advice and referrals, it has even less impact on the lawyer-client relationship. In fact, the limitation does not affect ongoing relationships at all; it simply excludes certain cases from the federal program.

To overcome this crucial distinction from *Rust*, Respondents insist that "challenges to existing law" will generally not be apparent at the outset of representations, but will arise midstream, leaving LSC lawyers unable to raise certain arguments in lawsuits. While this contention may be superficially plausible, it cannot withstand scrutiny, particularly on this facial challenge.[6]

[6] Respondents suggest that LSC has conceded that "the so-called deflection to another lawyer will often take place long into the case. . . ." Resp. Br. at 31 n.30 (citing LSC Br. at 7 n.4). LSC makes no such concession; Respondents are misreading our initial brief.

Since the suit-for-benefits limitations went into effect in August 1996, LSC-funded lawyers have handled more than 150,000 benefits claims, six thousand of which involved litigation.[7] Of these cases, Respondents have not identified a single LSC lawyer who learned, in the middle of a case, that she ought to amend a complaint to add a challenge to existing law.[8] LSC lawyers have obviously determined that thousands of cases could be handled ethically and competently under the limitation.

To overcome this single dispositive fact, Respondents manufacture a series of unsupportable claims:

- That challenges to existing law will arise as a result of new facts learned during discovery. Resp. Br. at 24-26; NYSBA Br. at 7-8. In fact, the claims excluded by the suit-for-benefits limitation are not fact-intensive, but turn on an argument that the text of a regulation or statute violates the text of some higher law.[9] Such

[7] LSC lawyers have handled more than 500,000 "Income Maintenance" matters since August 1996. LSC has determined that about 150,000 of these matters involved welfare benefits of the sort covered by the suit-for-benefits limitation. *See* Legal Services Corporation, 1996 Facts at 12-13; Legal Services Corporation, 1997 Annual Report at 4; Legal Services Corporation, 1998 Fact Book and Program Information, at 12-13; Legal Services Corporation, Serving the Civil Legal Needs of Low-Income Americans, A Special Report to Congress (April 2000) at 7. Of those matters, 6,039 were litigated to decision or settled during litigation.

[8] The lead Respondent, Carmen Velazquez, initiated her case *before* enactment of the suit-for-benefits limitation. C.A.J.A. 276-79.

[9] The cases cited by *amicus* NYSBA Br. at 26 n.11 illustrate this point. *E.g. Sullivan v. Zebley*, 493 U.S. 521 (1990) (HHS regulation violated federal statute); *Blum v. Bacon*, 457 U.S. 132 (1982) (New York statute violated federal regulation); *Califano v. Westcott*, 443 U.S. 76 (1979) (federal statute violated due process clause); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (New York City regulations violated due process clause); *Shapiro v. Thompson*, 394 U.S. 618

claims can be identified by an experienced benefits practitioner at the outset of the representation—as evidenced by the thousands of representations so far. Although that process may require some investigation prior to taking a case, lawyers must frequently gather certain facts to determine whether they can handle a potential new matter. This task does not violate either the First Amendment or lawyers' ethical duties. *See* ABA Op. ("Before accepting a new client a Legal Services Lawyer subject to LSC funding restrictions must inform the client about all of the restrictions . . . and must carefully screen the client to ensure that the representation will not endanger funding.").

- To bolster their contention that LSC lawyers cannot identify "challenges to existing law" at the outset of a representation, Respondents argue that the term "existing law" is too vague for consistent application. Resp. Br. at 24-27. But LSC's regulations explicitly define this term. *See* 45 C.F.R. § 1639.2 (1997). Respondents repeatedly fail to reckon with this definition.[10]

(1969) (state and D.C. statutes violated due process clause); *King v. Smith*, 392 U.S. 309 (1968) (Alabama regulation violated Social Security Act); *McCoy v. Department of Health & Welfare*, 907 P.2d 110 (Idaho 1995) (Idaho regulation violated Title X).

[10] Respondents argue that because the Constitution itself is "existing law," it is meaningless to allow suits *under* "existing law" but to prohibit constitutional challenges to "existing law." Resp. Br. at 24. But the definition of "existing law" excludes constitutional law. *See* 45 C.F.R. § 1639.2(b) (1997). Similarly, although Respondents cite *Rist v. Missouri State Division of Family Services*, 595 S.W.2d 783, 785-86 (Mo. Ct. App. 1980), for the proposition that it is often impossible to determine whether an adverse welfare determination is based on "existing law" or mere "policy," the unpublished state policy in *Rist* clearly was not "existing law." *See* 45 C.F.R. § 1639.2(b) (1997).

- Finally, Respondents contend that claims challenging the fairness of an agency determination will not become apparent until after the LSC lawyer has already begun representing the client before the agency. NYSBA Br. at 8. If LSC lawyers determine that they must terminate the representation at this discrete point—after an agency decision but before any litigation has begun—the lawyer's withdrawal does not threaten the client with claim preclusion; it merely requires the client to find a new lawyer for the next phase of the representation. This is not a significant impingement of the lawyer-client relationship.

Even if these contentions were correct, however, and LSC lawyers sometimes discover challenges to existing law in the middle of cases, they will not be faced with the impossible dilemma posited by Respondents. There is no reason to believe that other legal aid organizations or *pro bono* lawyers will not handle these cases. *See infra*. at p. 15. LSC grantees can even create their own affiliates to litigate these matters. *See infra* at pp. 18-19. This court should not presume "prejudice" on this facial challenge.

In sum, Respondents have not established a "substantial probability" that the suit-for-benefits limitation will disrupt ongoing attorney-client relationships, or that any such disruption will work a "significant impingement" on the attorney-client relationship. Thus, LSC rejects Respondents' absurd allegation that it is intentionally requiring its lawyers "to act in tension with, if not in direct contravention of, 'the high standards of the profession.' " Resp. Br. at 48-50. There is nothing unethical about declining to accept a matter that is outside the LSC program. *See* ABA Op. ("A Legal Services Lawyer

is not obligated to find alternative counsel for a potential client who has been turned away."). Respondents' free association claim should be rejected.

C. The Suit-for-Benefits Limitation Does Not Prevent Welfare Claimants from Challenging the Welfare Laws

Respondents also contend that LSC grantees are often the only lawyers available to challenge welfare reform laws, and that the suit-for-benefits restriction therefore "prevents an indigent client from addressing legitimate arguments . . . through counsel." Resp. Br. at 27; *see also* NYSBA Br. at 18-27. While Respondents press this point repeatedly, it is unclear whether they are trying to resurrect their Fifth Amendment "access to the courts" claims (Resp. Br. at 32 n.31)—which the district court rejected as "rather casual," Pet. App. (99-603) at 82a-83a, and Respondents abandoned on appeal—or make a First Amendment argument. Either way, the argument should be rejected.

In *Ortwein v. Schwab*, 410 U.S. 656 (1973), recipients of welfare benefits challenged a filing fee that effectively prevented them from bringing lawsuits to review agency decisions that reduced their benefits. This Court dismissed their due process claim, holding that since they had received all the pre-reduction process required by *Goldberg v. Kelly*, 397 U.S. 254 (1970), they were not entitled to "an appellate system" to challenge the agency determinations in court. *Ortwein,* 410 U.S. at 659-60. This Court also dismissed the equal protection claim, holding that the filing fee satisfied the rational basis test applicable to a rule that does not include a "suspect classification." *Id.* at 660-61. Last, the Court summarily concluded that re-characterizing the claim under the First Amendment added nothing. *Id.* at 660 n.5 ("Our discussion of the Due Process Clause . . . demonstrates

that appellants' rights under the First Amendment have been fully satisfied.").

Similarly, in *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 316, 330 (1985), veterans challenged a statutory $10 maximum fee that could be paid to an attorney who represented a veteran seeking benefits for service-connected death or disability. This Court reversed a nationwide preliminary injunction against enforcement of the limitation, holding that plaintiffs' facial challenge did not make the "extraordinarily strong showing" necessary to prove they had been denied meaningful access to the courts in violation of the Due Process Clause. The Court also rejected the First Amendment claim, holding it had no "independent significance." *Id.* at 335. In fact, the Court questioned whether the First Amendment claim was appropriate at all, noting that "the constitutional analysis of a regulation that restricts core political speech . . . will differ from the constitutional analysis of a restriction on the available resources of a claimant in Government benefit proceedings. . . ." *Id.* at 335 n.13.

The suit-for-benefits limitation is far less burdensome than the provisions considered in *Ortwein* and *Walters*.[11] While those provisions actually created obstacles to the assertion of benefits claims, Respondents in this case allege that welfare claimants could not challenge the welfare laws with or without the suit-for-benefits limitation. Thus, if Congress had not created the LSC program in the first place, indigent welfare claimants would "have the same choices as if [the government] had chosen not to" create the program at all. *Webster v. Reproductive Health Services*, 492 U.S. 490, 509 (1989). This

[11] Although *Walters* involved veterans' benefits rather than welfare benefits, *Walters* is nevertheless instructive in that the Court denied a facial challenge to a limitation on claimants' ability to obtain lawyers to contest government benefits determinations.

is not a constitutional violation. *Rust*, 500 U.S. at 203 ("Petitioners contend . . . that most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services. But . . . these Title X clients are in no worse position than if Congress had never enacted Title X.")

Finally, Respondents have not made the "extraordinarily strong showing" necessary to justify an injunction against enforcement of a federal statute. *Amicus* NYSBA contends that in 22 states, LSC funds constitute more than 50% of the total funding available for civil legal services for low-income individuals. NYSBA Br. at 20. Here the NYSBA essentially ignores *pro bono* service; law firms, bar associations, and private lawyers acting individually may well be interested in lawsuits that could vindicate the rights of thousands of welfare claimants. Other non-LSC organizations, such as the National Center on Poverty Law, are also filling the gap created by the congressional restrictions by hiring former LSC lawyers to engage in welfare-related "class action and individual cases with broad policy implications." *See* National Center on Poverty Law website, <http://*www.povertylaw.org/about ncls/whatwedo.htm*>. In fact, the NYSBA cites a handful of recent cases in which non-LSC lawyers successfully challenged welfare laws. *Id.* at 26-27. These cases are vivid proof that welfare reform litigation can and does take place notwithstanding the suit-for-benefits limitation.

From all the NYSBA's facts and figures, one stands out: No matter how this Court resolves the present case, the legal services available to meet the needs of the poor will be greatly insufficient. NYSBA Br. at 19. Invalidating the suit-for-benefits limitation will not alleviate that shortage. It will transfer control of the LSC program

from Congress, which decided to fund an apolitical benefits program, to LSC lawyers, some of whom want to participate in the contentious debate on welfare reform through their subsidized employment. But ultimately Congress has the power to define—or eliminate—the LSC program.[12]

D. LSC's Program Integrity Regulations Do Not Violate LSC Grantees' First Amendment Rights

Finally, Respondents challenge LSC's program integrity regulations, claiming that overturning this limitation on the use of non-federal funds would provide a "less intrusive ground on which to affirm the decision below." Resp. Br. at 33 n.32. In fact, the challenge to the program integrity regulations is far more intrusive, because it would invalidate LSC's enforcement of a crucial element of all the provisions in the 1996 Act. Thus, the Court should reject Respondents' attempt to justify review of the program integrity regulations; this Court granted *certiorari* to review the court of appeals' invalidation of the suit-for-benefits limitation, not its approval of the program integrity regulations.

If the Court decides to hear this challenge, the program integrity regulations should be upheld. Although Respondents allege that the regulations cannot survive "strict scrutiny," the strict scrutiny cases cited by Respondents involved direct restrictions on First Amendment activity;[13] insofar as we are aware, this

[12] Respondents' separation of powers argument is ironic when one considers that the lawyer-Respondents are trying to arrogate Congress's spending power to themselves.

[13] *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (prohibition on transmission of obscene/indecent communications); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (city ordinance banning certain signs); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (statute giving mayor unbridled discretion to prohibit news racks);

Court has never applied strict scrutiny in a selective subsidy case. *See, Regan v. Taxation with Representation*, 461 U.S. 540, 548-49 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right . . . is not subject to strict scrutiny.") (citations omitted).

Once the correct rational basis standard is applied, it is clear that the program integrity regulations serve two proper purposes. First, they prevent indirect subsidization of activities Congress chose not to subsidize directly. Respondents claim the district court held that a physically separate facility was not necessary to prevent indirect subsidization. Resp. Br. at 42. But the regulations do not require complete physical separation between LSC and non-LSC programs; they provide only that "the degree of separation" is a factor for LSC to consider when reviewing a grantee's relationship with an affiliate. 45 C.F.R. § 1610.8(a) (1997). Under these circumstances, LSC reasonably determined that "mere book-keeping separation" could allow federal funds to "cross-subsidize" restricted activities.

The second valid purpose of the program integrity regulations is preventing public confusion over whether the government is endorsing the activities of LSC lawyers. Pet. Cert. (99-603) at 77a-80a. Respondents claim this justification is inapplicable to the LSC program because "there is no risk at all that the public will confuse federal government funding of litigation against itself with federal endorsement." Resp. Br. at 42-43. But the federal government will not be the defendant in lawsuits seeking welfare benefits from state and local agencies; in

Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147 (1969) (restriction on participation in parades); *Niemotko v. State of Maryland*, 340 U.S. 268 (1951) (prosecution for Bible talks); *Schneider v. State of New Jersey*, 308 U.S. 147 (1939) (prohibition on distribution of handbills).

those cases, the federal government will appear to be subsidizing suits against the states. Congress's decision not to subsidize these suits is valid, particularly in light of Congress's virtually simultaneous decision "to increase the flexibility of States" to administer certain welfare laws. 42 U.S.C. § 601(a) (Aug. 1996). Congress legitimately decided that it cannot fairly delegate administration of the welfare laws to the states while simultaneously funding lawsuits alleging that the states are administering those laws improperly.

On this *facial* challenge, Respondents cannot prove that the program integrity regulations do not rationally serve these two legitimate purposes. As the court of appeals concluded, Respondents have not established "that no set of circumstances exists under which the Act would be valid." Pet. Cert. (99-903) at 20a (citing *Rust*, 500 U.S. at 183). Thus, the Court should reject Respondents' suggestion that the regulations are so burdensome and wasteful that no grantee can create an affiliate under them.[14]

The few facts before the Court dispell this contention. At least two grantees have established affiliates in compliance with the program integrity regulations. Resp. Br. at 39. No Respondent alleges that LSC has questioned its certification of program integrity with respect to an affiliate. In fact, LSC has notified only one grantee that its attempt to create an affiliate did not meet the regulations. That incident proves nothing, however, because the grantee did not make a good faith effort to comply with the regulations, but instead simply created two separate corporations that shared all personnel, office space, office equipment, and library facilities. CAJA 538-44. There is no reason to conclude that the program integrity regulations are facially unconstitutional.

[14] Contrary to Respondents' suggestion (Resp. Br. at 44-45 n.45), they have brought a facial challenge because they are seeking relief that would invalidate the 1996 Act and/or the program integrity regulations with respect to any LSC lawyer, donor or client, regardless of their circumstances; Respondents are not seeking relief only for themselves, based on how statutes or regulations have been applied to their own individual circumstances. *Walters*, 473 U.S. at 316 and 336-39 (O'Connor, J., concurring) (1985). It is particularly obvious that Respondents' challenge to the program integrity regulations is facial; none of the Respondents is an LSC grantee who alleges that it tried to set up an unsubsidized affiliate, but was unable to do so.

Finally, Respondents contend that LSC did not have the statutory authority to issue the program integrity regulations, citing a portion of the section-by-section analysis of a 1996 Senate bill. Resp. Br. at 34-35. The language Respondents cite was a comment to a section of similarly worded bill (S. Rep. No. 104-392 at 61-62 (1996)) that *was deleted from the 1996 Act as enacted.* Thus, if anything can be gleaned from the legislative history of the 1996 Act, it is that Congress deliberately decided *not* to prohibit affiliate corporations. As the court of appeals correctly recognized, "LSC enjoys 'the full measure of interpretive authority under the [LSC Act]' to promulgate" the program integrity regulations. Pet. App. (99-603) at 11a. The program integrity regulations should be upheld.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals, insofar as it invalidated the suit-for-benefits limitation, should be reversed.

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Respectfully submitted,

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